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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971
No. 71-951

ALMOTA FARMERS ELEVATOR AND WAREHOUSE COMPANY, a Washington Corporation,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY TO QUESTION PRESENTED

Respondent's question is erroneous as it makes the issue one of whether a lease renewal expectancy can be recovered as an item of compensable property whereas the true problem is should that expectancy be considered as an inherent element of value in determining just compensation for a tenant's leasehold improvements taken where great value is thereby added by the probability of their continued use in place.

REPLY TO STATEMENT

In the record as made in the trial court there were no disputed facts. But that is not true here regardless of Petitioner's previous assumption to the contrary. The answering brief at page 4 states as a fact that the Government

> "Prior to bringing the instant suit it settled with the railroad. * * * (Pet. App. A, p. 34)."

That statement is positively not supported by any evidence or admitted fact. The quoted citation refers only to an unsupported statement in the Circuit Court opinion now under review. Presumably, that conclusion was seized upon from a footnote to that effect in a Government brief to the court which gave no supporting citation. In fact it was not true. The erroneous statement was overlooked by petitioner and not called to the Court's attention. It is not an agreed or admitted fact (App. 22) nor was it one of the facts found by the District Court (App. 35).

That same assertion was made in the answering brief to Almota's petition for writ of certiorari in this proceeding. It was replied to at page 1 of the reply brief. Nevertheless, it is reasserted

without citing any supporting record fact. In now failing to cite the record the Government is presumably conceding that there is none.

The statement at page 5 of the answering brief that the District Court agreed Almota's compensation should include "the possibilities of renewal of the lease" is misleading in that it is subject to the interpretation that the court allowed recovery for a renewal expectancy as a compensable property right whereas it held only that in the determination of the fair market value of the tenant owned improvements the possibility of renewal should be considered as an element of inherent value along with all other elements affecting their fair market value (App. 17,27,43, & 47 & Pet. App. A 50).

The Circuit Court in its reversal and holding that the renewal expectancy was not a compensable legal interest overlooked the fact that the District Court awarded no compensation for any such interest.

There has never been any contention either that the agreed market value of $274,625 exceeds in any amount the enhancement in the market value of the fee as a whole arising from the tenant owned improve-

ments or that the agreed value of $130,000 is equal to the sum by which those improvements increased the value of the property as a whole.

REPLY TO ARGUMENT

The Government's argument is primarily based upon the premise that payment is only required to be made for "property rights". It assumes the District Court allowed and Almota is claiming compensation for the possibilities of the renewal of the lease as a compensable property right. It concludes that since they do not rise to that status they cannot be considered in determining just compensation.

Petitioner's opening brief already fully answers that argument particularly commencing at page 19. It should suffice to reiterate that the trial court only held and Almota only contends that the probability of the renewal of the lease is an inherent element of value greatly increasing the market value of the building improvements owned by petitioner in that it made probable a continued use of the property in place thereby making that one of the reasonably expected uses to which the property could be put and

which must be considered in its valuation. Thus Almota will not have received just compensation for those property rights until it is paid their full fair market value considering all elements affecting that value which sum is agreed to be $274,625 (App. 29-30).

Basically the fallacy of the government results from restricting the market value of the building improvements at the end of the term of the lease to salvage or removal value without considering any other probable use of the property. What is to be recovered in the way of economic salvage from tearing down a 148,460 bu. concrete grain tank or to be gained from attempting to move such a huge structure? Presumably, had the improvements been taken concurrent with the expiration of the lease their salvage or removal value would be virtually nothing even though they could then be sold for a large sum and added great value to the property as a whole. The Government would thereby obtain valuable improvements without substantial compensation.

The Petty Motor Company case (327 U.S. 372), chiefly relied upon by the Government, in no way purports to lay down any

rule for the valuation of tenant owned improvements. It does rule that payment need only be made for property rights taken but it does not hold that inherent elements of value affecting their market price must rise to the status of compensable property rights before they can be considered in the determination of the fair market value of property taken. Other cases cited in Petitioner's brief (p. 18-21) repeatedly state that in the determination of market value all uses to which the property may reasonably be put must be considered. It was agreed by stipulation that there was a great likelihood of a lease renewal (App. 25). Hence it has in effect been agreed that the continued use of the improvements in place is a reasonably probable use to which they may be put upon the termination of the lease.

As pointed out in the opening brief (p. 18-25) elements affecting market value may be considered even though they do not in themselves constitute a legal property right. An additional case so holding and not previously cited is Sittenfeld v. Tobriner (459 F.2d 1137, Wash.D.C. Cir.). The court there held with reference to litigation of fair market value in a condem-

nation action that evidence of a reasonable probability of rezoning was admissible. The opinion states at page 1139:

> "Thus, it would have been appropriate for appellants, had they proceeded with the condemnation hearing rather than settling, to have introduced evidence tending to establish just compensation. We have no doubt that such proof could have properly included evidence of a reasonable probability of rezoning."

The Scully case (409 F.2d 1061) is also heavily relied upon. As explained at page 33 of Petitioner's brief that case is not decisive of the issue here as it involved only the apportionment between a landlord and a tenant of an entire award already made. The opinion states "* * * * the value of the leasehold must be reexamined within the framework of the existing total award which cannot now be disturbed". The Scully landlord had a legal right to refuse to renew the lease but the Government here did not as the railroad was still the owner (App. 11).

The Scully case was an application of the unit rule which the Government is here declining to follow. The value of the improvements was arrived at by an apportionment. Since an erroneous value had been

attributed to the lease, exclusive of improvements, it was considered possible that some part of the erroneous value had been apportioned to the improvements. That conclusion appears to have been influenced by the tenant's argument. The court observed, "This does not mean, as urged by the lessee, that the full amount of the comparable sales prices should now be taken to have been paid for the improvements only." The court went on to state, "Thus, the true value of the improvements should not be affected by the fact that the renewal expectancy value cannot be recovered in this suit." Here the Government is not willing to allow to the tenant the true value that the tenant owned improvements added to the unimproved fee whereas in the Scully case the full value contributed by the improvements to the property as a whole was allowed.

The Fisherman's Association case cited (174 F.2d 739) is not in point as the property taken was held under a permit which had been revoked prior to the taking. No possibility of renewal and continued use in place existed. Salvage or removal was the only possible use.

Commencing at page 16 of the Govern-

ment brief it is argued that Almota's only legal rights in the property consisted of its use to the end of the term plus the then removal or salvage value of the improvements; that the stipulated $130,000 compensation (App. 29) was full payment for the use value to the end of the term; that the right to remove the buildings was by stipulation restored to Almota; and since it could take the buildings that was full compensation for their removal value and hence Almota has been fully compensated for all legal property rights taken.

Several fallacies appear in that argument. First, Almota's legal rights were not so limited. On the very date of the taking it is by agreed stipulation clear that upon assignment of its lease and the delivery of a bill of sale to its improvements Almota could have received in a fair market sale the sum of $274,625 (App. 29-30). For over seven years from the date of taking,[1] Almota would have had a right to negotiate similar sales. At the end of the term of the lease and for six months thereafter (App. 7) it would still

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(1) May 26, 1967 (App. 23). The lease was to expire October 12, 1974 (App. 24).

have the right to sell and transfer its improvements for whatever they would bring upon the market. During those same periods it could negotiate with the railroad for the purchase of the fee and/or a renewal of its lease.

Using the Government's own reasoning, the $274,625 stipulated figure results in a probable value at the end of the term a great deal less than the true worth at that time. Respondent attributes the full $130,000 stipulated value as being for the use of the property during the term. That should likewise be true of the stipulated $274,625 value so that the remaining worth at the end of the term would be $144,625. Yet, at ordinary depreciation rates the facilities could be expected to then be worth in the area of $200,000[1] which would economically allow over $55,000 to be paid for the fee title or for a lease renewal or permit a discount of that amount to be made in a sale and still result in Almota obtaining the stipulated value of $274,625. I would be most amazing if

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(1) The $274,625 value depreciated at a 3% annual rate for 7 1/4 years would result in a depreciated value of approximately $214,000 at the end of the term.

offered compensation of far less than that amount failed to result in a purchase or the renewal where the land had only been renting for $114.20 per year (App. 6).

A second matter ignored in the argument concerning revesture is that this case has been presented upon an agreed stipulation to the effect that, if it is concluded that all elements which actually affect fair market value are considered, Almota should be awarded the sum of $274,625 (App. 29-30). If all of those elements of value are not entitled to consideration then Almota is to be awarded $130,000 (App. 29). Under either determination Almota was agreed to have the right to remove all or any portion of the improvements without any deduction for them. That removal right was not intended to compensate Almota for the value of its improvements at the end of the term. The Government had no actual use for the improvements (App. 28). By the very nature of the structures and their permanency they were presumably a liability to the Government involving substantial expense for their removal in the clearing of the area for the dam project for which they were acquired. They were of slight value to Almota considering that salvage would only produce junk

value and removal costs would be tremendous.

Much is made of the argument that the Government should not have to pay more than would be required of a private buyer. It is speculated that a private buyer could acquire the fee and then refuse to renew the lease or that the Government might have done the same thing. But this case must be decided upon the facts as they are and not upon what they might have been. Moreover, that contention is now precluded by the stipulated market values. In essence it is only an argument that the agreed market value of $274,625, considering all elements of value, is more than the true market value.

The stipulation must be read as a whole. The only condition of an award of $274,625 to Almota is a final determination by the court that all elements affecting market value must be considered.

Also, there is no argument whatsoever that that stipulated amount is in excess of the added value of the improvements to the property as a whole. Under the unit rule that amount should be award-

ed to the tenant[1] which the Government is here declining to do.

At page 28 of the brief the Manhatten case (388 F.2d 596) is misinterpreted. The Government would have the court believe that the case was only one considering salvage value whereas the Second Circuit in both that and the Upper Allegheny case (441 F.2d 356) are definitely laying down the rule that a tenant's fixtures upon condemnation are to be valued as used property for use in place where they are at the time of the taking regardless of the remaining term of the lease.[2]

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(1) See opening brief p. 34, 36. The rule is stated with approval in Carlock v. United States, 53 F.2d 926, Wash. D.C. Cir., as follows:
"The proper rule governing condemnation proceedings in cases of this sort is stated in ....104 A.429,... where the court said: 'in proceedings instituted and to condemn the reversionary interest, as well as the leasehold interest, the rule is to ascertain the entire compensation to be allowed as though the entire title or estate in the property belonged to one person, and then apportion the sum between the holders of the different interests, according to their respective rights.'"

(2) The matter was previously discussed at pages 25 & 26 of the opening brief.

It is true that in the Allegheny case value for use in place was not allowed not because the court did not follow the rule but because use in place was not their highest and best use.[1]

In the light of Respondent's entire argument and Petitioner's contentions it should be noted in further reply. By the cited statute (84 Stat. 1821, 33 U.S.C.A. 595a) on the taking of property for river improvements, by the agreement of the parties, by the prior proceedings in the lower courts, and by almost all of the cases, market value is here the measure of just compensation. The property taken was a leasehold of unimproved land plus the tenant improvements placed thereon. The value of the lease, exclusive of the improvements, is its use value to the end of the term less the rent. The continued use of the tenant's improvements in place at the end

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(1) The court stated: "Normally the value of trade fixtures for use in place will exceed their salvage value. But if a lessee had located or arranged his machinery or other fixtures in such a manner that their full economic potential cannot be realized on the premises, it is not inconceivable that the market will value them more highly for a better use elsewhere. This appears to have been the situation at Allegheny * * * *."

of the term was a reasonably probable use in view of the probability of a lease renewal. It was an element affecting the market value to the extent of $144,625 ($274,625 - $130,000). By the cases fair market value includes all uses to which the property may reasonably be put and all elements of value affecting the market. So determined the parties agreed that the fair market value of the Almota property taken, consisting of the leasehold and the tenant owned improvements, was the sum of $274,625. It follows that no lesser sum is just compensation or will place Almota in the same pecuniary position as before the taking.

Though not mandatory in this case it should be persuasive that the Congress now takes the view that the award of removal value to a tenant for his improvements is really not fair, sufficient, or just compensation for property taken. That is a legislative recognition of the justice of the Petitioner's contentions. The legislation referred to is 84 Stat. 1905, 42 U.S.C.A. 4652, adopted Jan. 2, 1971, which states in the pertinent portions: "(b) (1) For the purpose of determining the just compensation to be paid for any building,

structure, or other improvement * * * * the fair market value which such building, structure, or improvement contributes to the fair market value of the real property to be acquired, or the fair market value of such building, structure, or improvement for removal from the real property, whichever is the greater, shall be paid to the tenant therefor."

CONCLUSION

Petitioner concludes that the award of just compensation for its property rights taken requires the reversal of the judgment of the Ninth Circuit Court of Appeals entered in this case on Sept. 23, 1970, and reinstatement of the judgment of the District Court to thereby award Almota the sum of $274,625.

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